Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

Kenneth Curtis,
Individually and d/b/a
Privacy Protection Services,
Petitioners,

v.

The State of South Carolina,
The South Carolina General Assembly
Ex rel., Charles M. Condon, as Attorney
General for the State of South Carolina

On Petition For Writ of Certiorari
To The South Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether South Carolina Code Ann. § 16-14-370 violates Article I, Section 8 of the United States Constitution by prohibiting the transportation of urine into South Carolina.

2. Whether South Carolina Code Ann. § 16-14-370 violates the Petitioner's First Amendment Rights of Freedom of Expression. If so, has the State shown a compelling state interest and demonstrated that the statute is the least restrictive means of ensuring its stated interest, in accordance with the Fourteenth Amendment?

3. If South Carolina Ann. § 16-14-370 does not violate the Petitioner's First Amendment Rights of Freedom of Expression, whether the State has demonstrated a legitimate state interest in enacting S.C. Code Ann. § 16-14-370 in accordance with Petitioner's Constitutional right to Substantive Due Process under the Fourteenth Amendment.

4. Whether South Carolina Code Ann. § 16-14-370 violates the Petitioner's Constitutional Right of Procedural Due Process under the Fourteenth Amendment because it is vague, overbroad and has the potential of selective enforcement.

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Kenneth E. Curtis, individually and d/b/a Privacy Protection Services
Petitioner,
v.
The State of South Carolina, The South Carolina General Assembly Ex rel. Charles M. Condon, as Attorney General for the State of South Carolina
Respondent.

Petition for a Writ of Certiorari to the South Carolina Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

Kenneth E. Curtis respectfully petitions for a writ of certiorari to review the judgment of the South Carolina Supreme Court in this case.

OPINIONS BELOW

The opinion of the State Supreme Court is reported at 345 S.C. 557, 549 S.E. 2d 591 (2001). App. *infra.* at 1a.

JURISDICTION

The South Carolina Supreme Court entered its judgment on July 17, 2001. Petitioner timely sought rehearing by the South Carolina Supreme Court, and that request was denied on August 10, 2001. App. *infra.* at 24a. This Court's jurisdiction is invoked pursuant to the United

States Constitution article VI, section 2. U.S. CONST. art VI, § 2.

CONTROLLING CONSTITUTIONAL PROVISIONS

U.S. CONST. art 1, § 8

"The Congress shall have power to . . . regulate commerce with foreign nations, and among the several states and with the Indian Tribes"

U.S. CONST. amend. I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to perform the government for redress of grievances."

U.S. CONST. amend XIV, § 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

A. Overview

The Petitioner appeals the South Carolina Supreme Court's decision upholding the constitutionality of South Carolina Code Ann. 16-13-470 App. *infra* at 33a. passed into law on June 11, 1999 (1999 Act No. 65). This statute among other things makes it a felony to sell urine with the intent to defraud a drug or alcohol screening test and originally created a presumption of intent to defraud when a heating element, or other such device, or instructions that provide a method to thwart a drug-screening test accompanies the sale, distribution or marketing of urine.

In 1996, the Petitioner started a business over the internet known as "Privacy Protection Services." The Petitioner considered the business primarily as a method of expressing his views about the invasion of privacy that the national trend of urinalysis for numerous purposes by employers has become. The Petitioner began to sell his own urine to interested individuals for whatever use they wished. The urine is certified as drug and adulterant free. Petitioner accompanied the sale of his urine with a pouch, tube chemical hand warmer type device and directions and statements concerning the flaws of urinalysis. The Petitioner does not tout the product as a means to avoid detection of drug or alcohol abuse. Based upon an article that was published in a Greenville business magazine concerning Petitioner's business, a Bill was introduced by Greenville Senator David Thomas to prohibit Petitioner's business and this Act was passed into law on June 11, 1999.

B. The Prior Lawsuit

Petitioner filed a Complaint and Motion for an Ex Parte Temporary Restraining Order and Motion for Temporary Injunction. App. *infra* at 39a. The Honorable Charles B. Simmons, a Circuit Court Judge, issued an Order granting the Ex Parte Temporary Restraining Order on March 18, 1999. The Motion for a Temporary Injunction was then heard before, the Honorable Thomas J. Ervin, on June 25, 1999. The trial court denied the Motion for a Temporary Injunction at the hearing. A formal Order was filed on July 3, 1999. A Motion to Reconsider was filed, and on July 14, 1999 an Order signed by Judge Ervin, denied the Motion.

The Honorable Henry F. Floyd conducted a hearing and ordered bifurcation of the proceedings between the Temporary Injunction and the merits of the case. The Honorable Alison Renee Lee heard the Motion regarding the merits, and found the Petitoner's causes of action unsubstantiated by Order filed August 18, 2000. A Motion to Reconsider was filed and Judge Lee denied the Motion to Reconsider on September 29, 2000.

Separate appeals were filed to the South Carolina Supreme Court regarding Judge Ervin's Order denying the request for a Temporary Injunction and Judge Lee's Order ruling on the merits. The South Carolina Supreme Court heard oral arguments on October 4, 2000. The Supreme Court reviewed both the Temporary Injunction and merits issues at that time. On July 17, 2001 the Court affirmed Judge Ervin's Order and issued their ruling striking the presumptive intent clause of the statute, but holding that the way the urine was packaged, can be used as circumstantial evidence. The remainder of section 16-13-470 was held to be valid. Consequently, the South Carolina Supreme Court's Order should have said "Affirmed in part and Reversed in part", due to its striking down part of the statute.

A Petition for Rehearing was filed regarding the July 17, 2001 Order, and the Supreme Court denied the Petition for a Rehearing on August 10, 2001 ending the state appeals for the Temporary Injunction matter.

On October 12, 2001, the Supreme Court issued an Order regarding the merits appeal, although they discussed the merits in the July 17, 2001 Order. App. *infra.* at 18a. The October 12, 2001 Order, affirmed as modified the July 17, 2001 Order. Therefore, another Petition for Rehearing was filed on October 26, 2001, regarding the merits. The time of the filing of this petition, Petitioner has yet to hear from the South Carolina Supreme Court as to the status of the Petition for Rehearing regarding the merits. App. *infra.* at 27a. Petitioner will amend this petition with the status of the second rehearing request when it is received. However, for Petitioner to preserve his appeal to the United States Supreme Court and meet the ninety-day filing requirement, Petitioner files this petition in response to the August 10, 2001 South Carolina Supreme Court Order denying rehearing.

Petitioner first raised the issue that his constitutional rights were violated by the enactment of S.C. Code Ann. § 16-13-470, in his initial Complaint filed June 18, 1999 and in

his Amended Complaint filed October 4, 1999. App. *infra* at 39a & 47a. Petitioner alleged that his First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated along with his rights under Article I, § 8 of the United States Constitution.

REASONS FOR GRANTING THE PETITION

The Supreme Court should grant review of this petition for a writ of certiorari for the following compelling reasons. First, the South Carolina Supreme Court decided important issues that conflict with several United States Supreme Court decisions regarding the Commerce Clause, First Amendment and Fourteenth Amendment. The narrow issue to be determined by this Court, which has not been previously addressed, is the validity of a state's statute that completely prohibits the sale or transport of urine into a state's borders, and whether the state can prohibit such conduct and violate people's First Amendment rights in the name of promoting a safe work environment. The decision by the South Carolina Supreme Court expands the scope of a state's right to interfere in the relationship between a private employee and a third party with the alleged interest of promoting work place safety. The State Court's decision conflicts with relevant constitutional issues.

Petitioner has standing to assert the unconstitutionality of the Act. Petitioner has been arrested twice for "violating" section 16-13-470, and is currently facing felony charges that carry a sentence of either ten thousand dollars or five years in prison or both. The Act, as drafted, constitutionally proscribes Petitioner's own conduct, which permits him to sell his urine in conformity with his beliefs, regardless of the intent of his customers.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PREVIOUS DECISIONS. THE STATE COURT'S DECISION HAS THE POTENTIAL TO GREATLY EXPAND THE SCOPE OF A STATE'S RIGHT TO INTRUDE INTO THE AFFAIRS OF PRIVATE CITIZENS.

In order to present a backdrop to Petitioner's claim, a succinct discussion of the history of urine testing in our courts, along with the problems and concerns that arise when urine tests are performed, is essential. The State of South Carolina down plays the link between the validity of urine testing and the issues involved in Petitioner's claim for justice. Yet, it is the State of South Carolina that brings the urine testing issue into the forefront of Petitioner's claim, since they are the ones who assert the insurmountable need for urine testing for the endorsement of a "safe work environment".

A. Constitutionality of urine testing

In 1989, this Court examined the constitutionality of urine test administered by the federal government in two cases. In Skinner v. Ry. Labor Executives Ass'n., 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed. 2d (1989), railroad employees were required to undergo a urine test at the demand of the their employer under limited conditions. Testing was required either when there was an accident at work, or a violation of certain safety rules. The proponents of preserving this regulation on railroad workers argued that railroad employees posed a serious threat of safety to innocent citizens, the environment and the economy. Their arguments were based on studies correlating damages and accidents with intoxicated railroad workers.[1] However, the challengers of the regulation asserted that the regulation invaded the Fourth Amendment rights of the employees.

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[1] In eight years there were forty-five accidents relating to alcohol and drug abuse. There were thirty-four persons who were killed and sixty-six injured, with 28 million dollars in damages. Id. dissent.

The Fourth Amendment guarantees the privacy, dignity and security of persons against certain arbitrary and unusual acts by officers of government or those acting at their direction. Camara v. Mun. Court of San Francisco, 387 U.S. 523, 528, 87 S.Ct. 1737, 18 L.Ed. 2d 943 (1967). When asserting the invasion of their right to privacy, the challengers argued that urine samples require employees to perform an excretory function, which is among the most private act an individual can perform.

This Court held that although the railroad employees' Fourth Amendment rights were implicated, it had been shown that railroad employees pose a serious threat to safety; therefore, the limited conditions in which the employees were to perform urine tests were deemed appropriate. "The necessity to perform that regulatory function with respect to railroad employees engaged in safety sensitive tasks, and the reasonableness of the system for doing so, have been established in this case." Skinner, 489 U.S. at 633.

Conversely, Justice Marshall joined by Justice Brennan in the dissent, stated that "few activities in our society [are] more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it all." Skinner, *supra citing* National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (Ca. 5 1987). Justice Marshall went on to pronounce that urine test can not measure current impairment and therefore cannot differentiate between "on duty impairment" and prior drug and alcohol use which has ceased to effect the user's behavior. Id. *citing* 49 CFR § 219.309(2) (1987). "The goal is to ascertain current impairment and not identify persons who have used substances in their spare time and pose no risk to on duty impairment." Skinner, 489 U.S. at 652.

The same day the Supreme Court decided National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384 (1989). In Von Raab, employees at the National Treasury who applied for promotions that would include direct involvement in the interdiction of illegal drugs into

the United States were subject to urine testing. Proponents of the urine testing proclaimed that the policy rationale was if these individuals were granted the promotion, they would be carrying firearms, and that carrying a deadly weapon with impaired judgment or perception would be harmful. In addition, there was concern about the possibility of these individuals being more susceptible to accepting bribes when specializing in the deterrence of illegal drugs into the United States. The proponents further went on to proclaim that the public should not bear the risk that these employees might suffer from an impaired perception. Although the opposition was willing to concede that drug abuse is one of the most serious problems that plague our country today, they opposed the regulation because it was not in response to any perceived drug problem. Furthermore, the urine testing had not led to discovery of any significant number of drug users within the ranks of those applicants being tested. Von Rabb, 489 U.S. at 683.

The Court held that the government's compelling interest in safeguarding the borders of our country and the public safety is greater than an employee's individual privacy interest. The Court also remanded the issue of whether those who handle classified information shall be subject to urine testing. The dissent authored by Justice Scalia and joined by Justice Stevens, acknowledged the majority's concerns and went on to state a powerfully eloquent opposing opinion. The dissent first recognized that the government could not justify the purpose, need, or reason for the regulation, ". . . notably absent, revealingly absent and as far as I am concerned dispositively absent is the recitation of *even a single instance* in which any of the speculated horrible actually occurred . . ." Von Raab, 489 U.S. at 683.

More recently the Supreme Court has ruled on the constitutionality of urine testing outside of the work-related context. In Veronia Sch. Dist. v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed. 564 (1995), the Court held that random drug screening on student athletes was valid. The Court found there was an important interest in preventing health

issues that arise among athletes who use drugs, and that the regulation would serve as a deterrent against drug use among students.

However, in Ferguson v. City of Charleston, 532 U.S. 646, 115 S.Ct. 2386, 132 L.Ed. 2d 205 (2001), the Supreme Court struck down a South Carolina regulation that would permit pregnant mothers who tested positive for drugs, to be arrested. The Court reasoned that the regulation did not meet the "special needs" required to mandate a Fourth Amendment nonconsensual search. Under section 16-13-470, South Carolina has now made that same pregnant mother subject to incarceration if they perceive that she attempts to "foil" a drug test by consuming excessive amounts of water, the primary adulterant of drug tests, even though they cannot arrest her for testing positive.

Petitioner believes that Ferguson *supra* is a perfect example of why he promotes his product and that his business is not driven by profit. Petitioner feels that like the women in Ferguson, people should have the right to protect themselves from the overreach of law enforcement. He is aware that many people have their constitutional rights violated with no recourse to prevent that from occurring. Therefore, his business is used to educate people and to encourage people to begin to question the validity of actions by government, employers and hospitals that require them to perform, without valid probable cause.

The precedent that South Carolina wants to establish is a novel step into the private relationship between employer and employee. The Supreme Court acknowledges that the Fourth Amendment does not apply to private industries but rather only to government employees. "Although the Fourth Amendment does not apply to search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the government." Skinner, 489 U.S. at 613. Previous cases have addressed only the direct relationship between the employer and the employee and the employer's

ability to test for drugs in certain prescribed situations. S.C. Code Ann. § 16-13-470 deviates from this narrowly tailored approach by including a third person, the Petitioner. This Act holds a third party responsible for the behavior of an employee at work.

The South Carolina Supreme Court in their Opinion misguidedly states, "A statute making it unlawful to defraud a drug test furthers the public purpose of ensuring a drug free workplace." Curtis v. South Carolina, 345 S.C. 557, 570, 549 S.E.2d 591, 599 (2001). However, no evidence has ever been presented that urine testing prevents anything. The ramifications exceed not only the private workplace and the doctor-patient relationship, but also every aspect of society. The State has never rebutted Petitioner's assertions and evidence that urine testing at work is not effective in securing a safe work environment.

B. Use and the Validity of Urine Testing

The use of urine testing is on the rise. In 1987, 21.5% of employers used urine testing compared to a dramatic increase in 1994 to 87.29%.[2] Urine testing has been found to be unreliable. The false positive rate is at least ten (10%) percent and could be as high as thirty (30%) percent.[3] Vicks Formula 44-M and codeine have been identified in urine tests as heroin, Nyquil as amphetamines and Advil as marijuana.[4] Accuracy of drug testing is imperative because there are better ways to test workplace safety.[5] It is evident that by the time an employee's test has been taken, interpreted as positive and returned to the company, any effects of the drug-impaired behavior has worn off. In

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[2] Comer, Debra R. "An Evaluation of Fitness-For-Duty Testing." 103rd Annual Convention of the American Psychological Association. New York. 15 Aug. 1995

[3] See American Civil Liberties Union Briefing Paper Number 5 <http://www.geocities.com/CapitolHill/6443/aclu.html

[4] Id.

[5] Medical World News, Medical Tribune Inc., Volume 29, No. 8. The Case Against Urine Testing. "Urinalysis rests largely on the assumption that fear of detection discourages drug use through intimidation."

addition, there are numerous household items that create false negatives for drug tests such as water, bleach, drain cleaner, soap and vinegar.

The better alternative to urine testing for promoting a "safe work environment" is performance-based testing. Performance testing, for example, assesses hand-eye coordination.[6] An employer may also select to invest in a machine that scans the eyes. The eye scan can be completed in thirty seconds and will detect fatigue, drugs and alcohol use.[7] The benefits in using these alternatives are that 1) it takes less time to collect the data (typically less than a minute; 2) the cost is between $100 - $200 per employee per year (compared to $40 - $60 per test); 3) the results are immediate; 4) it affords better assessment of job performance; and 5) these tests can detect drug use that eludes urine testing (if an individual used cocaine moments before testing the metabolites may not be in the urine).[8]

If this Act is driven by the apprehension of drug abuse in South Carolina's work force, it would be better to create a proactive solution than a reactive solution to this "crisis." Employers should put their efforts into creating policies and procedures that permit competent supervision of their workforce, professional counseling, and a voluntary rehabilitation program.[9] A proactive program is a better investment in an employer's time and resources than testing for a substance that no longer effects the individual's work performance. As currently enacted, the Act fails to meet the stated governmental interest of promoting workplace safety.

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[6] "Daily Skill Test System checks hand-eye coordination in under one minute." (visited Oct. 25, 2001)<http://www.geocities.com/CapitolHill/6443/performa.html

[7] "Fit 2000 Eye Scan Performance Testing." (visited Oct. 25, 2001) <http://www.geocities.com/CapitolHill/6443/fit2000.html

[8] Comer, Debra R., *Supra.*

[9] See ACLU Briefing Paper Number 5.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE SECTION 16-13-470 IS AN IMPERMISSIBLE PROHIBITION AND RESTRICTION ON ARTICLE I SECTION 8 OF THE CONSTITUTION.

A. Overview of Commerce Clause.

The Act is an impermissible prohibition and restriction on U.S. CONST. art 1 § 8, commonly referred to as the Commerce Clause. The "prevailing motive [behind the Commerce Clause] was to regulate commerce; to rescue it from the embarrassing and destructive consequences resulting from legislation of so many different states and to place it under protection of a uniform law." Gibbons v. Ogden, 26 U.S. 1, 6 L.Ed. 23, 9 Wheat. 1 (1824). The theme that the Framers desired to create is one of a national area of free trade. Unreasonable burdens on interstate commerce violate the Commerce Clause in and of itself. Dennis v. Higgins, 498 U.S. 439, 111 S.Ct. 865, 112 L.Ed. 2d 969 (1991); American Trucking Ass'n v. Scheiner, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed. 2d 226 (1987). The Supreme Court held that "the fact that Congress has not seen fit to prescribe any specific rules to govern inter-state commerce, does not affect the question. **Its inaction on this subject . . . is equivalent to a declaration that inter-state commerce shall be free and untrammeled.**" Welton v. Missouri, 91 U.S. 275, 23 L.Ed. 347, 1 Otto 275 (1875) (emphasis added). Furthermore, it has been an imbedded constitutional doctrine that "where Congress has not acted, **this Court**, and not the state legislature is **under the Commerce Clause the final arbiter of competing demands** of the state and national interests." Southern Pac. Co. v. Arizona, 325 U.S. 761, 768, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945).[10]

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[10] *See also* Cooley v. Bd. of Wardens, 53 U.S. 299, 13 L.Ed. 996, 12 How. 299 (1851); Kansas City So. Ry. Co. v. Kaw Valley Drainage Dist., 233 U.S. 75, 34 S.Ct. 178, 62 L.Ed. 419 (1919); Southern Covington & Cincinnati St. Ry. Co. v. Covington, 235 U.S. 537, 546, 35 S.Ct. 158, 59 L.Ed. 350 (1915); Missouri,

B. S. C. Code Ann. § 16-13-470 is a direct prohibition on interstate commerce.

There are two ways in which a state can violate the Commerce Clause. First, a state may not prevent shipment of goods into another state. Second, a state cannot create regulations that unreasonably impact commerce. *See* Bowman v. Chicago & Northwestern R.R. Co., 125 U.S. 465, 8 S.Ct. 689, 31 L.Ed. 700 (1888). A state cannot put a barrier around its border to bar trade from other states and thus bring to naught the great constitutional purpose of the Founding Fathers in giving Congress the power to regulate commerce. Nippert v. Richmond, 327 U.S. 416, 66 S.Ct. 586, 590, 90 L.Ed. 760 (1946). The United States Supreme Court held that so long as Congress remained silent on the matter, **a state lacks the power of statewide prohibition of traffic on intoxicants**. *See* Bowman, 125 U.S. 465; Leisy v. Hardin, 135 U.S. 100, 10 S.Ct. 681, 34 L.Ed. 128 (1890). Furthermore, a state cannot exclude an article of commerce "simply by declaring that its policy requires such exclusion." Bowman, *supra*.

South Carolina Code Ann. §16-13-470 states "It is unlawful for any person to . . . transport urine into this state with the intent of using the urine to defraud a drug or alcohol screening test." S.C. Code Ann. §16-13-470(A)(1) (Supp. 2000). This provision clearly regulates commerce as it relates to other states. The statute completely **prohibits** urine being transported into this state for the perceived intent to defraud drug or alcohol testing.

C. If the Act is not a direct prohibition on interstate commerce it is an unreasonable restriction on interstate commerce.

This Court should not accept the flimsy argument adopted by the South Carolina Supreme Court that urine can be sold, but not for the limited purpose of defrauding

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Kansas & Texas Ry. Co. v. Texas, 245 U.S. 484, 488, 38 S.Ct. 178, 62 L.Ed. 419 (1919).

alcohol and drug tests. If this Court were to follow suit, than the following factors should be considered: 1) the nature and extent of the burden that state law has on interstate commerce; 2) the reason the state adopted the law; and 3) the weight of the other states and national interest. The Court should consider whether the third factor is greater than the first two factors to mandate a finding that the law is inapplicable. Southern Pac. Co., 325 U.S. 761.

There are several scenarios in which the Act impermissibly burdens interstate commerce. Every human being or animal is able and capable of producing urine. Therefore, since the statute does not distinguish between human and animal urine, nor does it stipulate how the urine must be packaged, every animal and human crossing over the borders of South Carolina, whether traveling through or making it their place of destination, is subject to the parameters of this law. If a South Carolina resident purchased urine over the internet and it was mailed to his or her home and the resident worked in Georgia and used the urine in Georgia, how does that impact South Carolina's concern of promoting a "safe work environment"? In a similar scenario, if a Florida resident purchased urine and the product was shipped from North Carolina to Florida via ground transportation, that truck could be violating the statute as a carrier, for transporting urine into the State of South Carolina with the intent to defraud an alcohol or drug test, which again is not being performed in South Carolina. Otherwise, the carrier would have to reroute travel through the state of Georgia to avoid any possible violation of this statute, thereby incurring much delay and expense. Finally, if someone from South Carolina purchased the urine, and decided not to use it, Petitioner may be responsible although the product was never used.

As stated above, South Carolina adopted the Act under the premise of promoting "safety in the workplace." There has been no evidence tendered by the government to support this blanket representation. There has been no showing that an increased danger in the work place results from employees being intoxicated or under the influence of

illegal substances. There has been no showing of a concern among the workforce, employers, insurance carriers or law enforcement that workplace safety is of widespread imminent concern. Therefore, Petitioner asserts that South Carolina's purported reason for adoption of the law does not truly protect a legitimate public purpose.

The burden this Act creates upon interstate commerce is tremendous. The law impedes the movement of commerce from state to state; interposes a substantial obstruction to the national policy of free commerce; and burdens interstate commerce with delays and increased costs due to rerouting.[11] Furthermore, people can serve jail time or pay a fine for entering into the State of South Carolina with urine.[12]

In Breard v. Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951), the majority held that an ordinance prohibiting the solicitation of magazines from door to door at people's residences was a valid regulation and not an undue burden on interstate commerce. However, the strong dissent authored by Chief Justice Vinson joined by Justice Douglas makes a fervent point in that the statute is an undue burden on interstate commerce because it makes criminal a legitimate business. The dissent further recognizes that the majority reasons their order by classifying the local ordinance as a regulation rather than a prohibition. Chief Justice Vinson maintains that the local ordinance is a prohibition. The dissent further points out that one must look to the practical effect of the legislation rather than the original intent intended to burden interstate commerce. "We must guard against state action which in any form or under any guise, directly or indirectly burdens the prosecution of interstate business." Id. *citing* Baldwin v.

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[11] Raymond Motor Transp. v. Rice, 434 U.S. 429, 98 S.Ct. 787, 54 L.Ed. 2d 664 (1978); Bibb v. Navajo Freight Lines, 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed. 2d 1003 (1959).

[12] First offense a person must be fined no more than five thousand dollars or imprisoned not more than three years, or both; and second offense or subsequent offense, is guilty of a felony and fined not more than ten thousand dollars or imprisoned not more than five years or both. S.C. Ann. 16-13-470 (B)(1) & (2) (Supp. 2000).

G.A.F. Seelig, Inc., 294 U.S. 511, 522, 55 S.Ct. 497, 500, 79 L.Ed. 1032 (1935).

Therefore, the Court should find that this statute violates the Commerce Clause of the Constitution by prohibiting commerce into the state of South Carolina and also by interfering with the national interest and burden on interstate commerce. The Court should further find that this burden significantly outweighs the state's rationalization for enacting such idle legislation.

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ACT VIOLATES PETITIONER'S SUBSTANTIVE DUE PROCESS RIGHTS, UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION.

A. Overview of Substantive Due Process.

The Act violates the Petitioner's Substantive Due Process rights. The Fourteenth Amendment of the United States Constitution provides that "no state shall . . . deny to any person within its jurisdiction Equal Protection on the laws." U.S. CONST. amend. XIV. Substantive Due Process assures that a law will be fair and reasonable and not arbitrary, and should be applied where a law affects the rights of all persons with respect to a specific activity. Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934)

B. The Act fails under the Strict Scrutiny Test.

Strict scrutiny applies when government legislates on the basis of suspect classification, fundamental rights or protected First Amendment rights. Petitioner asserts that South Carolina Code Ann § 16-13-470 infringes upon his First Amendment rights. The impact of the Act prohibits him from expressing his ideas regarding the government's

interference with individuals' Fourth Amendment rights. Petitioner believes that a urine test is an invalid search into a person's bodily fluids that does not meet the threshold requirement of sufficient probable cause. Petitioner also asserts that an employer may find out private information from a urine test that they otherwise would not be able to have access to, such as pregnancy, mental disorders, prescription medications, and other medical conditions. Petitioner realizes the potential abuse of urine tests and strongly opposes their use due to the fact that there are less intrusive means to discern whether a person is impaired and is not able to safely work due to that impairment. Petitioner feels that a urine test is such an inadequate tool for determining impairment on employees that the test should not be used by employers. Petitioner's strong feelings regarding his beliefs have led to his promoting his own urine for sale over the internet. On his website[13] Petitioner does not encourage drug use nor does he encourage employees to defraud their employers. Petitioner's packaging is a further statement of his fervent beliefs. He packets his product in the same manner regardless of the intent of the individual purchasing the urine. Some customers may purchase the urine in support of the same beliefs as Petitioner, some for conversation, others for mere shock value; but regardless of why they purchase the urine, Petitioner has a constitutional right to be able to express his opinions and beliefs in a manner that is not destructive to the public. Petitioner is not forcing anyone to purchase his product, nor is he forcing anyone to pay attention to his beliefs. Furthermore, our society and judicial systems have recognized and protected other forms of expression that may be offensive to people such as Marijuana leaves on shirts and bumper stickers, offensive lyrics that talk about killing cops, or the right to burn a flag in public protest.

Therefore, if the Court acknowledges that Petitioner's First Amendment Right of Freedom of Expression is being impacted by the Act, then the correct standard in evaluating the statute should be strict scrutiny.

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[13] Privacy Protection Services at www.privacypro.com

Under the strict scrutiny standard, the burden of persuasion is on the government to prove that the measure being challenged is **necessary** to further a **compelling** interest.[14] The word "necessary" is defined as not having a less restrictive alternative means available. Board of Trustees v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed. 2d388 (1989). South Carolina declares their "compelling interest" is to promote a "safe work environment". Curtis, 345 S.C. 557. As discussed above, there are other less intrusive measures available to promote work place safety than broad prohibition on the sale, distribution, or transportation of urine. The State of South Carolina may well suggest that this is not the correct analysis in addressing the strict scrutiny standard to Petitioner's claim. They will most likely propose that Petitioner is permitted to sell his urine, just not for the purpose of defrauding drug or alcohol test, and therefore this is the least restrictive mean. The least restrictive mean should be linked to the "compelling state interest," and surely the State of South Carolina is not arguing their "compelling state interest" is to limit the sale of Petitioner's urine.[15] Moreover, the onus is on the government to prove its burden under the strict scrutiny analysis, and typically in cases where strict scrutiny is applied the law is found to be invalid. Bernal, *supra* 467 U.S. 216.

The South Carolina Supreme Court erred in finding that the statute ensures drug screening is effective when there was no evidence presented to support that contention. The Court is correct in stating that drug screening has been held lawful in certain limited situations. The constitutionality of drug screening does not, however, extend to this statute which does not serve to protect the

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[14] Bernal v. Fainter, 467 U.S. 216, 104 S.Ct. 2312, 81 L.Ed. 2d 175 (1984) *citing* Gunther, "The Supreme Court, 1971 Term - - Foreword: In Search of Evolving Doctrine of a Changing Court: A Model for a Newer Equal Protection." 86 Harv. L. Rev. 1, 8 (1972).

[15] In R.A.V. v. St. Paul, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed. 2d 305 (1992), the Court correlated "compelling state interest" with the least restrictive alternative, when they posed, "The dispositive question is whether content discrimination is **reasonably necessary** to achieve St. Paul's . . ."

general safety and welfare of the public. No evidence has been presented that the Petitioner's business actually serves to defraud drug tests or that the use of his product affects workplace safety. In fact, the drug screening tests do not indicate impairment at all and are therefore not useful for establishing problems with job performance or safety. One might concede that such application for defrauding tests for safety sensitive positions might be of public concern. However, the blanket provisions of this Act are appallingly unrelated to a public purpose.

The South Carolina Supreme Court also erred in generally deriving the purpose of the statute in the absence of a legislative history that reflects such purpose. The lower courts stated that the General Assembly had determined that the statute is necessary to protect the public interest in a safe workplace; however, there is no evidence to support that finding. The only public purpose propounded by the State is the unsupported finding of Judge Ervin denying the temporary injunction.

C. The Act also fails the Rational Basis Test.

If this Court finds that Petitioner is not asserting a valid First Amendment violation, then the Court should apply a rational basis standard. The rational basis standard requires that the law cannot be arbitrary or unreasonable, in other words the state's purpose must be legitimate for enacting the law. Lyng v. Int'l Union, 485 U.S. 360, 108 S.Ct. 1184, 99 L.Ed. 2d 380 (1987).

The Respondents assert that the purpose for enacting South Carolina Code Ann. §16-13-470, was to promote and establish a "safe work environment." The statute does not refer to a limited application in work environment situations. Furthermore, the Attorney General and the Supreme Court of South Carolina have both recognized the purpose of the Act as promoting a "safe work environment." However, there is no evidence, statistics or studies linking urine testing and workplace safety. South Carolina's work force is labor-intensive and largely

comprised of manufacturing, construction and agricultural type positions. Therefore, the government's interest in employees with **safety-sensitive jobs** is not applicable. *See* Skinner, 489 U.S. at 630. Employees in the State that have highly sensitive job functions such as federal agents, armed forces personnel, or employees at nuclear power plants are subject to federal regulations, including federal drug testing policies.

South Carolina's Legislature is free to enact regulations as to the manner in which drug and alcohol tests are performed on their employees because there is a greater interest regarding that employer-employee relationship. However, in the present case, the government is interfering with and mandating the conduct that must take place between private individuals and private employers. It is difficult to ascertain the State's interest in that private relationship without any evidence that a problem exists and that this Act impacts that problem in any way. The government is only speculating as to potential problems that may exist in the private workforce.

No part of the legislation reflects a reasonable and rational relation to a legitimate public purpose. If the State may not order urinalysis without reasonable suspicion, it may not prohibit the conduct set forth in the Act to protect private urinalysis without reasonable suspicion. Furthermore, no evidence has been presented by the Respondents to support the proposition that this Act protects a legitimate public purpose. The Respondents failed to submit even affidavits showing how this Act will serve to lessen drug use in the workplace or in any way to promote the safety, health, or welfare of the citizens of this State.

Petitioner does not debate that drugs can be problematic in our society, but Respondents have failed to provide evidence that this Act would prevent drug or alcohol abuse in the workplace. Furthermore, they offer no explanation to rebut the presumption that a positive drug test does not indicate that the individual is currently impaired by any substance.

Above all, urine testing is an invasive step into an individual's private life. Urine testing has numerous pitfalls including inaccuracy, false detections, and inability to adequately test job performance. In addition, there are other measures that can be implemented that are less intrusive such as performance testing, eye scans, enhanced supervision, and detection of individuals with the potential need for counseling. Giving states the ability to pass any laws they choose in the name of promotion of workplace safety has dangerous implications. Carried out along this Act's line of reasoning, states could proscribe any conduct they wished simply by stating a tenuous connection to drug use.

IV. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ACT VIOLATES THE PETITIONER'S PROCEDURAL DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION.

The Act violates the Petitioner's Procedural Due Process rights. A violation of Procedural Due Process occurs when an individual's deprivation of life, liberty or property without the proper procedural safeguards. Carey v. Piphers, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed. 2d 252 (1978). The essential requirement of Procedural Due Process is that fair notice be given to those whom the law applies, along with providing proper adjudication standards for enforcing the law. *See* Leary v. U.S., 395 U.S. 6, 89 S.Ct. 1532, 23 L.E.2d 57 (1969). A statute may be pronounced invalid under two theories. First, the statute may be unconstitutional on its face. *See* Papachristou v. Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed. 2d 110 (1972); Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed. 2d 605 (1974). Second, the statute could be applied to both prohibitable and protective conduct. If a law's valuable effects are outweighed by the potential general way that it is applied, the law is found to

be unconstitutional as applied. *See* United States v. Grace, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed. 2d 736 (1983). The subject test violates Petitioner's Procedural Due Process rights because it is overbroad, vague and is subject to selective enforcement.

A. The Statute as Enacted is overbroad and vague.

A statute is overbroad if in addition to proscribing activities which may constitutionally be forbidden, it also sweeps within its coverage, speech or conduct which is protected. Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). Vague laws impact persons either by their uncertainty as to whether they are within the scope of the act or in regard to the applicable tests to ascertain guilt. Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948). *Cf.* Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed. 2d 584 (1972). Generally a vague statute that regulates First Amendment rights will be pronounced wholly void. Winters, 333 U.S. 507, 509-510; Thornhill, 310 U.S. 88.

The requirement that crimes be defined with appropriate definiteness, which has been referred to as a fundamental common-law concept, is now generally held to be an essential element of due process of law. Grayned v. Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed. 222 (1972). The underlying principle is that all persons are entitled to be informed as to what the state commands or forbids, and no one should be required, at peril of life, liberty or property, to speculate as to the meaning of penal statutes. Id. When persons of common intelligence must necessarily guess at the meaning of the statute and differ as to its application, the statute is vague, and therefore invalid. Connally v. Gen. Constr. Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 332 (1926). And no obedience may be exacted to a rule or standard that is so vague and indefinite as to be really no rule or standard at all. A. B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233, 45 S.Ct. 295, 69 L.Ed. 589 (1925).

The standard of certainty required is higher in statutes punishing for offenses than in the case of those depending primarily upon civil actions. The vice of unconstitutional vagueness becomes aggravated where a statute operates to inhibit the exercise of individual freedoms effectively guaranteed by State and Federal Constitutions. Id.[16]

Here we have a statute that is devoid of any definitions.[17] It doesn't even define that the urine must be human or otherwise. It fails to define what it means by defrauding a drug or alcohol test. Applied broadly if one attempted to conceal their partaking of hypertensive drugs, one would be guilty of this offense. Of course, section 16-13-470 does not limit its application to drugs that impair. It apparently applies to tests for any type of drugs whether legal or not.

South Carolina attempts to mitigate the effect of the Act by stating that Petitioner is able to sell his urine, just not for the purpose of defrauding a drug or alcohol screening test. However, this argument is implausible due to the fact that there is no practical way to enforce the statute.[18] The Supreme Court of South Carolina stated that the packaging can be used as circumstantial evidence and therefore a jury could use circumstantial evidence to infer intent. Curtis, 345 S.C. 557. Yet, Petitioner packages his urine in the same manner with the same materials regardless of who purchases the urine. Our government does not require those who sell alcohol to ask their customers if they intend to get drunk and drive, nor do they require those who sell bullets or guns to ask their customers if they intend to kill someone. The burden of asking customers their intended uses of the product is extreme, unproductive and unconstitutional.

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[16] *See also,* Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961); Winters, 333 U.S. 507, Scull v. Virginia, 359 U.S. 344, 79 S.Ct. 838, 3 L.Ed.2d 865 (1959).

[17] For example section 16-13-470 does not define the terms, "defraud", "spike", "foil", "adulteration" and "other bodily fluids".

[18] See the "Selective Enforcement" section *infra* for a more developed explanation.

South Carolina Code Ann. §16-13-470 does not properly notify those persons who may be affected. Regardless of the original motive behind the statute, it is impossible to be on notice that it is a criminal act to aid another in "defrauding" an underlying act which is not itself criminal. In other words, it is not practical for one to think that their act is criminal when the act they are alleged to aid in covering up is not a crime.

South Carolina Code Ann. § 41-1-15 states that a person who tests positive in a drug test at work is not subject to criminal prosecution. S.C. Code Ann. 41-1-15 (Supp. 2000). App. *infra* at 35a. Yet, the person who sells urine used in a drug test is criminally liable. Furthermore, the Act does not specifically address work place safety, rather it is aimed only at halting Petitioner's business. There are no public consequences to testing positive to a drug test administered on the job. In fact, employers may only release information of a positive drug result to certain enumerated people. Id. The Legislature has imposed a public consequence, however, for "defrauding a drug or alcohol screening test." This public consequence also extends to anyone using or selling any substance which may alter the results of a drug or alcohol screening tests. If the Legislature truly had an interest in preventing drug use in the workplace, it would impose a criminal penalty for testing positive on a drug test administered by an employer

Statutes that are vague and overbroad must have a "chilling effect." The "chilling effect" that the Act will have is that people will forego a protected activity rather than partake in an activity and violate the law. *See* Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.E.2d 15 (1974); Secretary of State of Maryland v. Munson Co., 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed. 2d 786 (1984). The Act discourages individuals from expressing their First Amendment rights in order to prevent possible a violation of section 16-13-470.

Therefore, section 16-13-470 should be struck down in its entirety as unconstitutional.

B. The Act is subject to Selective Enforcement.

The Act should be struck down because it is subject to selective enforcement. Selective enforcement occurs when certain classes of people or certain points of view are discriminated against. Smith v. Goguen, 415 U.S. 566. The risk is that when a statute is overbroad or vague, such as this one, it permits officials not only the opportunity to treat people differently but also the chance to violate the constitutional rights of one person without violating those of another. Overbroad and vague laws impermissibly delegate basic policy matters to policemen, judges and juries for resolution on a subjective basis. Grayned, 408 U.S. 104, 108-09, Hoffman Estates v. Flipside, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed. 362 (1982)

South Carolina Code Ann. §16-13-470 was written to include ALL persons who sell, distribute, transport, or use urine with the intent to defraud a drug test. Herbs, water, bleach and cleaners are used by individuals to defraud urine tests. Therefore, law enforcement would need to regulate the sale of these common household products to ensure that they are not violating the Act. The largest product used in defrauding a urine test is water. Therefore if someone purchases water, the distributor or the sales clerk should investigate and interrogate the customer as to their need or reason for the purchase. These common household products and herbs are packaged the same way regardless of the purpose of sale, just as Petitioner chooses to package his product. The government is placing a burden on one person, Petitioner, who is selling a product that may or may not be used to defraud a urine test, but not placing that burden on others who sell other products that may be used for that same purpose. If a water distributor has the same beliefs about the Fourth Amendment as Petitioner; and, therefore, chooses to place a marijuana leaf on the bottle, does that mean that his intent to defraud a drug or alcohol test may be inferred from the way he packages his water?

In Papachristou, *supra* 405 U.S. 156, the Supreme Court struck down a vagrancy law for being vague. The law stated that the persons who shall be punished are

> "dissolute persons who go about begging . . . common night walkers, . . . common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers,. . . persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses or places where alcoholic beverages are sold and served, persons able to work but habitually living upon earnings of their wives and minor children."

The Court reasoned that the statute violated Procedural Due Process for vagueness on several principles. First, the statute did not give fair notice. Second, there was no requirement of specific intent to commit an unlawful act. Third, the statute encouraged and permitted arbitrary and erratic arrests and convictions. Fourth, too much discretion was given to police to selectively arrest individuals. Fifth, the statute criminalized activities which by modern standards are innocent. Id.

The Court's reasoning and application in Papachristou can be easily applied to this Act. As previously discussed, the notice of prohibited activities is not clear. Additionally, specific intent can be inferred by circumstantial evidence, and the statute encourages erratic arrests based on perceived intent to defraud.

Furthermore, it is almost impossible to enforce the statute as it is written. There are several different products, some very common and are in everyone's household, that are used more frequently to defraud drug tests. Under the Act as written, the police may choose who they want to

arrest based on their perception of individuals attempting to defraud drug tests. Finally, the statute is criminalizing an individual's right to freedom of expression. "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public concern." Hustler Magazine v. Flynt, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed. 2d 41 (1988). Petitioner is well within his constitutional right to express his ideas and beliefs about urine testing and its ramifications, through packaging a natural product.

Therefore, this Court should find that the Act is unconstitutional.

CONCLUSION

Justice Scalia in the Von Raab dissent, paraphrased Winston Churchill who said, "all this contains much that is obviously true and much that is relevant; unfortunately what is obviously true is not relevant, and what is relevant is not obviously true." Von Raab, 489 U.S. at 682. The State of South Carolina created this statute to prevent Petitioner from expressing his beliefs on the Fourth Amendment and also to prevent Petitioner from selling his product. Petitioner was in business for years before section 16-13-470 was enacted. Senator Thompson found out about the business and was offended. "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding." Olmstead v. U.S., 277 U.S. 438 at 485, 48 S.Ct. 564, 72 L.Ed. 944 (1928). South Carolina's Supreme Court fails to recognize that **there is no evidence for the need to enact the legislation**. There has been no investigation, research, or committee formed as to how to react to the problem of an unsafe work environment. There has been no viewing of editorials, press releases or public debate demonstrating concern for an unsafe environment in South Carolina. There has been no evidence that drug and alcohol testing at work deters people from being intoxicated at work. There has been no demonstration of a legitimate public purpose. If South Carolina genuinely

was concerned about establishing and promoting a "safe work environment", than they would also mandate that employers establish an intervention and treatment program. Furthermore, the South Carolina Legislature could enact legislation that would address other contributing factors that would promote a safe work environment such as free counseling with those having emotional problems, a way to handle those who are sleep deprived, and promoting and educating people on healthier habits related to proper nutrition and exercise.

South Carolina Code Ann. § 16-13-470 infringes on interstate commerce because it acts as a complete prohibition of interstate commerce and not a legitimate restriction on commerce. It violates Petitioner's First Amendment rights. Furthermore the statute does not provide adequate notice and leaves the criminal justice system free to selectively enforce the law. Therefore, this Court should find that the Act is unconstitutional.

Respectfully submitted,

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